

***United States Court of Appeals
for the Second Circuit***



PETITION

ORIGINAL

74-1661

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P/S

Nos. 206, 339, 340—September Term, 1974
(Argued November 26, 1974 Decided September 9, 1975.)
Docket Nos. 74-1661, 74-1699, 74-1706

United States Court of Appeals

FOR THE SECOND CIRCUIT

FABRIZIO & MARTIN, INCORPORATED,
Plaintiff-Appellee-Appellant,

v.

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE, MARS ASSOCIATES, INC., and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,

Defendant,

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE,

Defendant-Appellant-Appellee,

AETNA CASUALTY & SURETY CO., Additional Defendant on the Counterclaim of Defendant Board of Education,

Defendant-Appellee-Appellant.

PETITION FOR CLARIFICATION



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Plaintiff-Appellee-Appellant,

v.

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE, MARS ASSOCIATES, INC., and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,

Defendant,

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE,

Defendant-Appellant-Appellee,

AETNA CASUALTY & SURETY CO., Additional Defendant on the Counterclaim of Defendant Board of Education,

Defendant-Appellee-Appellant.

PETITION FOR CLARIFICATION

Fabrizio, Plaintiff-Appellee-Appellant respectfully petitions this Honorable Court for a clarification of its decision dated September 9, 1975 and in support of this petition represents to the Court as follows:

This Court in its decision in the printed form on page 5988 noted that:

"Fabrizio and Aetna offered to complete [the construction]. The Board refused to accept the offer. Fabrizio performed extra work not contemplated by the original contract . . ."

That finding might be construed contradictory to this Court's observation that Fabrizio "walked off the job". If the "walking off" was caused by the Board's breach or anticipatory breach of its obligations to Fabrizio then, clearly, Fabrizio should be able to prove all of its damages caused by that breach.

In support of Fabrizio's position Judge Carter found the following facts which this Court characterized as "virtually undisputed" (5975).

"Construction began and dispute arose from almost the outset. The Board was slow in paying the monthly requisition which the contract called for. It delayed executing change orders with promptness and failed to make payments for work completed as prescribed and refused to allow extensions when extra work was required. Differences between the parties continued to magnify, and on March 2, 1966 Fabrizio advised the Board that it was terminating the contract. On April 5, 1966 the Board, Fabrizio and Aetna met to seek to determine whether their differences could be ironed out. Aetna proposed a solution and Fabrizio agreed that if that solution was acceptable, it would complete construction by July, 1966. The Board, however, decided to secure another contractor to complete construction and awarded the contract to complete construction to Mars Normel" (record at 1057a-1058a).

The Court remanded the case for proof of damages and it is not quite clear that Fabrizio is entitled to prove damages for breach of contract which he was prevented from proving initially because all Courts, including this Honorable Court, have heretofore proceeded on the erroneous assumption that the basic contract between Fabrizio and the Board was illegal and void for violation of the bidding statute, sec. 103 N.Y. General Municipal Law.

Fabrizio alleged breach of contract in the First, Third and Fourth causes of the complaint as referred to in the printed decision on page 5979, but consented to their dismissal on the basis of an initial holding that the contract was illegal and void (p. 5983 id.).

It should be noted that this case was previously before this Honorable Court and on two previous occasions. While the issue of legality was not directly tested there was tacit understanding that the contract was illegal.

In the light of the present decision by this Court that the contract is legal and enforceable it should be made clear that Fabrizio's causes of action for breach of contract are restored and that it may prove damages under the First, Third and Fourth causes as well as the remaining causes.

Respectfully submitted,

FABRIZIO & MARTIN, INCORPORATED
Plaintiff-Appellee-Appellant.

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Services of three (3) copies of
the within *Petition for Clarification* is
hereby admitted this *22nd* day
of *September*, 197*5*

James E. Gavner
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